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The CIA's extraordinary rendition and secret detention programme

European reactions and the challenges of future
international intelligence co-operation

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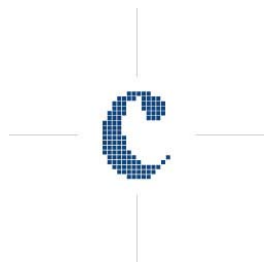
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1. Introduction

*'Safety from external danger is the most powerful director of national conduct.
Even the ardent love of liberty will, after a time, give way to its dictates.'*
(Alexander Hamilton, 1787)¹

*'All I want to say is that there was 'before' 9/11 and 'after' 9/11. After 9/11
the gloves came off.'*
(Cofer Black, 2002)²

Two images of the current 'war on terrorism' waged by the United States (US) reflect the extreme measures that the government has taken since terrorists attacked the country on 11 September 2001: one is a photograph published in various media which shows hooded and handcuffed detainees in orange overalls kneeling in wired cages, while the other shows a young female American soldier with a naked man on the floor to her right wearing a dog leash. Beside the military activities of the US government and its allies in Iraq and Afghanistan, the activities of the US Central Intelligence Agency (CIA)

1 Hamilton (1787).

2 U.S. Congress, Joint House/Senate Intelligence Committee (2002). Cofer Black was the Director of the CIA Counterterrorist Center from 1999 until May 2002.

have been in the spotlight of discussions among media observers, European institutions, human rights activists and academic scholars for several years.

The CIA has used parts of military prison facilities at, for example, Guantánamo Bay, Cuba (photograph 1), and Abu Ghraib, Baghdad, Iraq (photograph 2), for its own tactics in fighting terrorism.³ Such scenes of imprisonment and humiliation as illustrated by the two images are examples of US counter-terrorism activities beyond its state borders.

Arguably, the US conception of the fight against terrorism as a 'war' led to the use of extraordinary instruments by its biggest civilian intelligence agency, the CIA. Such measures include extra-legal renditions of terrorist suspects and their subsequent detention in secret prisons. There are serious allegations that the CIA has used means of torture to interrogate several suspects although the then President Bush insisted that US institutions do not use torture.⁴ The humiliating pictures of soldiers at the prisons at Guantánamo Bay and Abu Ghraib are particularly startling illustrations of the extreme measures taken against some prisoners, however.

As will be argued in this paper, the global reach of the CIA's activities also involves European state authorities and other actors. Forms of involvement range from an operational involvement to tolerating, or ignoring, the use of European territory for the purpose of renditions. While this involvement has been investigated by the Council of Europe (CoE) in great detail as well as by the European Parliament (EP), the overall picture remains rather vague and important facts are still missing.⁵ Nevertheless, the facts that are known ought to be understood as pieces of a jigsaw puzzle. The dimension of the issue is visible and there are still new jigsaw pieces added thanks to investigative journalists, investigative committees, individual testimonies by former detainees, reports by human rights organizations as well as, to a much lesser extent, government documents and statements by government authorities.

The US government reacted to serious criticisms and promised in 2006 that the prison camp at its US naval base at Guantánamo Bay would soon be closed. However, the facility remains open in 2008 and the condition of

3 Both detention facilities are American military-run. At Guantánamo Bay, the CIA has operated a holding and interrogation centre within the facility after the 9/11 attacks (Washington Post (2004)). The Fay-Jones Report on Abu Ghraib stated that the CIA conducted unilateral and joint interrogation operations at Abu Ghraib. The CIA detainees at Abu Ghraib have locally been called 'Ghost Detainees' since they were not accounted for in the detention system. Cf. U.S. Army, Office of the Chief of Public Affairs (2004).

4 The White House, Office of the Press Secretary (2006).

5 Think of the destruction of CIA tapes depicting investigations during which the technique of so-called 'waterboarding' is used. Cf. Guardian (2007a).

several individuals who are imprisoned at Guantánamo Bay remains unclear. Moreover, the whereabouts of certain individuals have not yet been identified by human rights activists. Some of the detainees used to be European residents before they were transferred to one of those prisons, but the respective European state governments have been hesitant to accept their return. In countries such as the United Kingdom and Germany, former prisoners from Guantánamo Bay have struggled to be allowed to return to their European host country. Can we then claim, using an old image of disinterest and ignorance, that the European governments have behaved like the three monkeys: have they seen nothing, have they heard nothing and have they said nothing? I will argue in this paper that the reactions by European governments and bodies are more complex but that there is indeed (still) a tendency for European states to bury their heads in the sand. The potential involvement of European governments in the respective counter-terrorism activities by the US government and, in particular, by the CIA, has not been discussed extensively and both parliamentary and judicial investigations have barely taken place so far.

Finally, the CIA's activities give rise to the question of what, if any, lessons can be learnt and how, if at all, such incidents might be avoided in the future. This is so far under-researched and the final section of this paper will therefore focus on one aspect only: that the practice of so-called 'extraordinary renditions' and secret detention illustrate serious problems with regard to the accountability and oversight of activities of intelligence services in general, and of foreign intelligence agencies in particular. This aspect has also been stressed by Terry Davis, the Secretary-General of the Council of Europe (CoE) on several occasions (cf. Section 3 of this paper). Assuming that an extreme case sharpens our analytical understanding, what can be learnt from this case in this context?

2. Extraordinary means in times of terror?

This section seeks to explore the ‘jigsaw puzzle’ of CIA activities in the ‘war on terror’ since the terrorist attacks on US soil on 11 September 2001. I will focus on the two most controversial issues, the so-called extraordinary renditions as well as the secret detention programme and the related allegations of torture. Referring to three well-investigated cases of Italian, Swedish and German residents who have been transferred to secret prisons, I will illustrate the different forms of rendition and the different level of involvement by European state authorities.⁶ While critical voices might point out that it is hypercritical to use some individual testimonies to draw a general picture, the numbers that are provided elsewhere indicate a much broader picture. Cautious estimations suggest that about one hundred and fifty people have been rendered worldwide between September 2001 and the beginning of 2005.⁷

The 2007 European Parliament’s Temporary Committee (TDIP) report stresses that more than a thousand CIA flights crossed European airspace between the end of 2001 and the end of 2005 and might be connected to a

6 What has been published so far in this context was mainly uncovered by investigative journalists or became public through judicial procedures by affected individuals.

7 The New Yorker (2005).

process of rendition.⁸ In a 2006 interview, the rapporteur of the TDIP, Claudio Fava, suggested that 30 to 50 people were rendered from Europe alone.⁹

Extraordinary renditions

The most detailed investigation into this issue so far has been carried out by the CoE Rapporteur Dick Marty.¹⁰ He maintained in two reports that between 2001 and 2006, European airspace had been used for flights operated by the CIA, and at least some of them for the purpose of extraordinary rendition. The term ‘extraordinary rendition’ is not a clearly defined legal term, however.

The European Commission for Democracy through Law, the so-called Venice Commission, suggested that the term ‘rendition’ refers to ‘one State obtaining custody over a person suspected of involvement in serious crime (e.g. terrorism) in the territory of another State and/or the transfer of such a person to custody in the first State’s territory, or a place subject to its jurisdiction, or to a third State.’¹¹ An individual is therefore surrendered to a foreign jurisdiction so that the receiving state can bring the person to trial for a certain criminal offence.¹²

Such an extradition is strictly regulated by a formal legal process, usually based on an international treaty and common international practice nowadays.¹³ The term ‘extraordinary rendition’ describes a particular type of

8 The European Parliament (EP) set up a Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners (TDIP). The Committee’s ‘Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners’ was published in January 2007, cf. European Parliament (2007). Hereafter referred to as the TDIP Report.

9 Council of Europe, Parliamentary Assembly (2006), par. 13 (hereafter referred to as the First Marty Report).

10 First Marty Report; Council of Europe, Parliamentary Assembly (2007) (hereafter referred to as the Second Marty Report).

11 European Commission for Democracy through Law (2006), par. 30 (hereafter referred to as the Venice Commission Opinion). Established in 1990, this Commission is an advisory body on constitutional matters to the Council of Europe (cf. <http://www.venice.coe.int/>).

12 Fitzpatrick (2003): 458.

13 While most of the existing extradition treaties are bilateral, the introduction of the European Arrest Warrant (EAW) in 2004 provides a unique example of a multilateral framework. The EAW substitutes the existing extradition treaties among EU Member States. Since it crystallises and simplifies the previous procedures, the instrument has been widely used from the beginning.

such transfers. It is not an official term but it roughly refers to ‘any occasion on which there is little or no doubt that the obtaining of custody over a person is, for one reason or another, not in accordance with the existing legal procedures applying in the State where the person was situated at the time.’¹⁴ Without exploring the legal debate, it is fair to observe that this type of rendition violates US law and existing international treaty responsibilities.¹⁵

Extraordinary renditions in the context of CIA counter-terrorism activities are composed of three ‘steps’, or elements, namely the apprehension, the transfer and the end point.¹⁶ These steps are all interconnected and have to be taken into account for a full analysis of the challenges that arise from renditions for democratic societies. The three elements can take various forms. The apprehension might, or might not, include a legal process and it can take place either ad hoc or in a planned manner. Marty’s investigative report into the extraordinary rendition programme explains that some of the individuals were kidnapped and then transported either to a US-run detention facility or to countries which are known for their use of torture.¹⁷

The transfer can then occur by various means, the most common of which is transportation by aircraft operated by CIA front companies or rental companies. Fava’s Report to the EP carefully pointed out that the Committee had collection data material suggesting that over one thousand stopovers had been made in Europe between late 2001 and late 2005, presumably operated by the CIA, and that some of those flights might have been used for the purpose of renditions.¹⁸ When Fava presented the report, he claimed more strongly that those flights were often used for the purpose of extraordinary renditions.¹⁹

The end point might be either a US military detention centre, a detention facility belonging to a third state or possibly a joint detention centre.²⁰ The variety of ways and means is illustrated, among others, by reports of non-governmental organizations and individual testimonies by rendered

14 E.U. Network of Independent Experts on Fundamental Rights (CFR-CDF) (2006), p. 6 (hereafter referred to as the CFR-CDF Report).

15 Silkenat / Norman (2007): 539. For an extensive legal analysis see The Committee on International Human Rights of the Association of the Bar of the City of N.Y. and The Center for Human Rights and Global Justice, NYU School of Law (2004). Cf. Satterthwaite (2007).

16 Cf. Reprieve 2007.

17 Hakimi (2007): 444; First Marty Report.

18 TDIP Report, p. 15.

19 TDIP Rapporteur Claudio Fava quoted in the First Marty Report, par. 13.

20 Reprieve (2007): 4.

individuals.²¹ Three cases are particularly well documented and will be briefly summarized in the following. One is the kidnapping of Hassan Mustafa Osama Nasr, usually referred to as Abu Omar, in Italy; the second case involves two Swedish residents, Mohammed al-Zery and Ahmed Agiza, both of whom are originally from Egypt; and the final case is the one of the German resident and Turkish citizen Murat Kurnaz. Much of what is known about the rendition flights was established by tracking down the aircraft involved with the data material provided by air safety agencies such as Eurocontrol and the European Union Satellite Centre. The aircraft with the tail-number N379P (N9068V) is sometimes referred to as the 'Guantánamo Bay Express'.²² It is the plane which was involved in the Swedish case (see below), for example, as well as in many other transfers. Journalists found out that this aircraft belongs to a CIA front company, namely Aero Contractors Limited.²³

Italy

The case in Italy was the first to be documented in Western Europe with respect to the extraordinary rendition campaign and it involves the first judicial examination of a case of extraordinary rendition.

In February 2003, Hassan Mustafa Osama Nasr, alias Abu Omar, was supposedly kidnapped by CIA officers in Milan. Via the US base in Aviano, Italy, he was transferred to Egypt, briefly released in 2004 and rearrested shortly afterwards by the Egyptian authorities.²⁴ He was finally released in February 2007. In connection with this rendition case, international arrest warrants for the arrest of a total of 22 staff members of the CIA believed to have been involved in this case were issued by a Milan court in June, July and September 2005. Most of the suspects' names are assumed to be aliases, however. The US government indicated that it would not extradite the US citizens to Italy, and in April 2006 the Italian government decided not to forward the extradition request.²⁵ Three months later, however, the Milan court issued additional extradition requests for three more CIA operatives, including Jeffrey Castelli, the station chief of the CIA Office in Rome at the time of Omar's abduction. Moreover, arrest warrants were issued for two senior Italian intelligence officers for alleged complicity in the kidnapping. On 8 June 2007, a trial commenced in Milan involving 25 CIA officers and one

21 For collections of testimonies by individuals imprisoned at Guantánamo Bay see e.g. Meeropol (2005); Willemsen (2007).

22 For example, Reprieve (2007).

23 Grey (2006): 23.

24 New York Times (2005a).

25 New York Times (2006a).

American who used to work at the US military air base in Aviano, as well as nine Italian intelligence officers, some of whom were former high-ranking intelligence officials, and all were accused of having been involved in the abduction of Abu Omar.²⁶ The Americans were put on trial in absentia.

After only ten days, the trial was adjourned for the first time in order to clarify whether the Italian Prime Minister could testify in this trial.²⁷ This was confirmed in the spring of 2008, when the trial finally resumed.²⁸ Bruno Megale, the head of the anti-terrorism police in Milan, testified in court in May 2008. Megale explained in detail how his police unit slowly uncovered the involvement of the CIA in Omar's kidnapping after his wife had reported him missing.²⁹ The prosecution claimed that the Italian police were not informed about the CIA's activities, but the Italian military intelligence branch, the Servizio per le Informazioni e la Sicurezza Militare (SISMI) had been informed. This had been earlier denied by the then Director of SISMI, Nicolo Pollari, who testified in 2006 and who is one of the accused Italian officials. On 17 September 2008, the judge rejected a request by Pollari to suspend the trial mainly due to reasons of state security.³⁰ But the trial was indeed suspended in December based on the government's argument that certain testimony could threaten Italy's national security in general and operations between Italian intelligence services and the CIA in particular.³¹ This is currently being looked into by the Constitutional Court whose ruling on this issue is expected on 10 March. The trial concerning the kidnapping of Abu Omar is scheduled to resume on 18 March.

Sweden

In December 2001, the Swedish government decided to expel two residents of its country, namely Mohammed Al-Zery and Ahmed Agiza. Both of them were originally from Egypt and the Egyptian government had issued arrest warrants for them, partly based on secret information provided by the Swedish Secret Police (SAPO).³² In order to transfer the two men to Egypt, the Swedish government asked for assistance by means of an aircraft. On the same day, the two Egyptians were transferred by a CIA team from Bramma Airport, Sweden, to Cairo, Egypt.³³ The story of Al-Zery and Agiza was the subject of a Swedish TV documentary which was aired on 17 May 2004. Staff

26 Times Online (2006b); Times Online (2008a); Los Angeles Times (2008).

27 New York Times (2007a).

28 Statewatch News Online (2008); New York Times (2008a).

29 Los Angeles Times (2008).

30 Times Online (2008a).

31 International Herald Tribune (2008b).

32 Grey (2006): 25.

33 Riksdagens ombudsmän (2005). See also Swedish Parliament (2005).

members and police authorities at the airport also testified about the unusual circumstances of the flight. One person from the airport police stated that his office used to be informed about all incoming flights, but that in this case it had not been contacted in advance concerning the incoming US plane.³⁴ Apparently, Swedish officials insisted on accompanying the American team and the two detainees on their way to Cairo. Having reached Cairo Airport, the Swedish officers returned directly to Sweden while Al-Zery and Agiza were handed over to Egypt's foreign intelligence service, the General Intelligence Service (EGIS).³⁵ The Swedish government claimed that it insisted that its Egyptian counterpart should ensure that the two detainees were well treated and later it assured a committee of the United Nations on several occasions that it had no reason to believe that the two were being tortured or maltreated. The committee had serious reasons to mistrust the claims of the government, however, and finally stated sharply that Sweden had 'committed a breach of its obligations' by neither 'disclosing to the Committee relevant information' nor voicing its concerns.³⁶ Both Al-Zery and Agiza were imprisoned in Egypt on terrorism charges. While Al-Zery was released in 2003 without trial, Agiza is still serving a 15-year prison sentence.³⁷

A parliamentary investigator conducted a probe into the case and concluded that the CIA operatives had violated Swedish law since they exercised police powers on Swedish soil and their activities subjected the prisoners to 'degrading and inhuman treatment'.³⁸ While the investigation did not have any political or judicial consequences, the Swedish government agreed in June and September 2008 to pay compensation to both Al-Zery and Agiza (about 330,000 each).³⁹ The government also decided to reconsider both Al-Zery's and Agiza's applications for asylum which the Swedish Migration Board had earlier rejected.

Germany

Murat Kurnaz is a German resident with a Turkish passport who travelled to Pakistan in October 2001. During his trip, local authorities arrested him in mid-November 2001. He was then transferred to US custody in Kandahar, Afghanistan, before finally being imprisoned in Guantánamo Bay detention camp in January 2002.⁴⁰ After his release from Guantánamo Bay in August

34 Grey (2006): 22-23.

35 Grey (2006): 27.

36 UN Human Rights Committee (2006).

37 Grey (2006): 31; International Herald Tribune (2008a).

38 Washington Post (2005a).

39 International Herald Tribune (2008a).

40 International Herald Tribune (2007a).

2006, Kurnaz claimed that there had been direct involvement by the German military during his stay in Kandahar. According to him, German soldiers ‘slammed his head on the ground and kicked him, to the laughter of American soldiers watching.’⁴¹ Germany’s Defence Ministry first claimed that there were no soldiers active in that region but later admitted their presence and that they had contact with Kurnaz. The Ministry still denies any mistreatment, however.

Confidential governmental documents published by the *Süddeutsche Zeitung* proved that staff members of Germany’s Federal Intelligence Service, the Bundesnachrichtendienst (BND), visited Kurnaz at Guantánamo Bay in September 2002 and interrogated him without finding any evidence that he might have been involved in any terrorist activity.⁴² According to Kurnaz, German authorities interrogated him there on two occasions.⁴³ Media reports said that the US government was willing to release Kurnaz into German custody under strict security regulations and accused Germany’s then government under Chancellor Gerhard Schröder of blocking Kurnaz’s return.⁴⁴ In particular, Schröder’s then Chief of Staff, Frank Walter Steinmeier, was criticized since he, as the Chief of Staff, was responsible for the intelligence services in Germany.⁴⁵ Steinmeier and other members of the Social Democratic Party (SPD) denied that the offer to release Kurnaz was a serious one by the US authorities.⁴⁶ During a meeting (the so-called *Präsidentenlage*) of representatives of the Ministry of the Interior, the Chancellery, the Federal Office for the Protection of the Constitution (Bundesverfassungsschutz) and the BND in October 2002, it was apparently decided that, if Kurnaz was released, he would be deported to Turkey. The official reason was that his right of residence had expired because Kurnaz did not report to the Aliens Registration Office as he was obliged to do.⁴⁷ The decision to block Kurnaz’s return to Germany was emphasized in October 2005 during another *Präsidentenlage*.⁴⁸ However, in November 2005 the Administrative Court of Bremen (Kurnaz’s place of residence) decided that he should not have been deprived of his residence permit.

41 New York Times (2006b); International Herald Tribune (2007a).

42 International Herald Tribune (2007a); Die Zeit (2007).

43 New York Times (2006b).

44 International Herald Tribune (2007a).

45 See also Die Zeit (2007). Steinmeier is now the German Foreign Minister.

46 Apparently, U.S. authorities would only release Kurnaz if the Germans would use him as an informant for intelligence purposes which was, according to Steinmeier, another reason for not taking the U.S. offer seriously. Cf. Die Zeit (2007).

47 This is a very cynical argument given the fact that German authorities were well aware that Kurnaz was unable to get out of Guantánamo Bay to follow the administrative procedures in Germany.

48 Die Zeit (2007).

The new Chancellor Angela Merkel was successful in December 2005 in obtaining the release of Kurnaz who returned to Germany in August 2006. He was formally cleared by the German government after his return to Germany.⁴⁹ Kurnaz's case was used by a US federal judge as an example that Guantanamo military tribunals violated prisoners' right to a defence.⁵⁰ In order to investigate the involvement of the BND in the US 'war on terror' a parliamentary committee was established. On 20 February 2006, the German Government provided the Committee of Inquiry (1. Untersuchungsausschuss) with a report 'on events relating to the Iraq War and combating international terrorism'. Based on this, the German Parliament decided to investigate, among other issues, how the government had handled Kurnaz's case. The mandate of the Committee is very broad, however, since it includes investigating several events and clarifying the political directions and the oversight of the activities of the BND, the BfV, the Federal Armed Forces Counterintelligence Office (MAD), the Federal Prosecutor General (GBA) and the Federal Criminal Police Office (BKA) in this context.⁵¹

One of the key 'events' mentioned in the report refers to the CIA rendition flights and covert prisons operated by US authorities. The mandate of the Committee has already been extended twice. Given the complexity of the mandate, the Committee appointed an expert investigator in July 2007, mainly in order to speed up the committee's work.⁵² The investigator provided a classified report in April 2008. According to media reports, the investigator stated that the former government was not directly involved in CIA renditions and that no secret prisons were located in Germany.⁵³ But he also admitted that he had to rely on poor and incomplete information and that he expects much more facts and testimonies to emerge in the near future. Also, the focus of the report appears to be very narrow since it does not deal with, for example, US military flights using German airspace.⁵⁴ As the first former Guantánamo detainee, Kurnaz testified before the US Congress on 20 May 2008.

The three cases show how well planned the CIA actions are. It can therefore be maintained that 'extraordinary rendition requires coordinated action of different government agencies, regularized practices, and some degree of institutionalization. The CIA must hire chartered jets, set up dummy

49 New York Times (2006b).

50 CBS NEWS (2008a).

51 Deutscher Bundestag (2007a).

52 Deutscher Bundestag (2007b).

53 Süddeutsche Zeitung (2008a).

54 Norddeutscher Rundfunk (2008).

companies, arrange to use U.S. military facilities, divert agents from their normal duties, find competent translators, develop relationships with non-U.S. intelligence bureaus, pay support staff, and, of course, implement highly structured and precise procedures for keeping all of these actions secret.⁵⁵ Given these complex preparations and procedures, some human rights observers queried whether the CIA could have rendered individuals without the state authorities of the respective countries knowing about this. Consequently, several European countries have been accused in reports provided by the CoE, the EP and some non-governmental organizations of ‘turning a blind eye’ to some of these covert activities. This paper will focus on the most detailed investigations which are the ones provided by the European bodies. In particular, the CoE Reports have been described as particularly relevant and in-depth examinations exercised with legal rigor.⁵⁶

In November 2005, the President of the Parliamentary Assembly of the Council of Europe (PACE) asked the Committee on Legal Affairs and Human Rights to explore the serious allegations which were published in a Washington Post article and in a follow-up report by Human Rights Watch.⁵⁷ The publications suggested that Member States of the CoE might be involved in denying human rights to terrorism suspects and thus that European state governments might be involved in the CIA rendition and secret detention programme. Consequently, the Committee announced the nomination of a parliamentary rapporteur for the purpose of investigating the possible involvement of CoE Member States in this context.

The investigation was led by the Swiss representative Dick Marty who published his first report on 12 June 2006 stating that the US had created a ‘spider’s web’ of flight routes.⁵⁸ His conclusions are sharp criticisms of European governments suggesting that their collusion allowed the ‘web’ to spread over Europe.⁵⁹ The Report emphasized that the following fourteen member states seem to have participated, in various ways, in the CIA rendition and secret detention programme: Sweden, Bosnia-Herzegovina, the United Kingdom, Italy, the former Yugoslav Republic of Macedonia, Germany, Turkey, Poland, Romania, Spain, Cyprus, Ireland, Portugal and Greece.⁶⁰ The ways in which European countries might be, or might have

55 Silkenat / Norman (2007): 544.

56 Hakimi (2007): 443.

57 Washington Post (2005b); Human Rights Watch (2005a).

58 For a graphic image of this see:
<http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957-1.jpg> .

59 First Marty Report, par. 284.

60 First Marty Report, par. 288-289.

been, involved in the rendition programme were described as follows. Member States were involved by:

- ‘secretly detaining a person on European territory for an indefinite period of time, whilst denying that person’s basic human rights and failing to ensure procedural legal guarantees...’ (First Marty report, par. 10.1);
- ‘capturing a person and handing the person over to the United States...’ (par. 10.2);
- ‘permitting the unlawful transportation of detainees on civilian aircraft carrying out ‘renditions’ operations...’ (par. 10.3);
- ‘passing on information or intelligence to the United States where it was foreseeable that such material would be relied upon directly to carry out a ‘rendition’ operation or to hold a person in secret detention’ (par. 10.4);
- ‘making available civilian airports or military airfields as ‘staging points’ or platforms for rendition or other unlawful detainee transfer operations, whereby an aircraft prepares for and takes off on its operation from such a point’ (par. 10.7); or
- ‘making available civilian airports or military airfields as ‘stopover points’ for rendition operations, whereby an aircraft lands briefly at such a point on the outward or homeward flight, for example to refuel’ (par. 10.8).

On 11 June 2007, rapporteur Dick Marty published his follow-up report. It strengthens most of the evidence provided in the first report and concludes, for instance, that there is now factual evidence that the CIA operated secret detention centres for some years in Poland and Romania which were run ‘directly and exclusively’ by the CIA.⁶¹ In contrast to the rendition campaign, however, Marty found that local staff had barely any meaningful contact with the prisoners. Instead, their job was to secure the outer premises or to provide logistical support.

To explore in depth the legal aspects of the CIA rendition and detention programme, the PACE Committee on Legal Affairs and Human Rights asked the Venice Commission to explore the international legal obligations and duties of CoE Member States with respect to secret detention facilities and interstate transport of prisoners.⁶² In its report, the Venice Commission assessed the legality of the conduct, i.e. secret detentions and interstate transfers, without referring to individual cases.⁶³ The report concludes that such conduct is incompatible with rights maintained in the European Charter of Human Rights (ECHR), an important cornerstone of international human

61 Second Marty Report, Introductory Remarks, par. 8 and Summary, p.1.

62 First Marty Report, par. 9.

63 Venice Commission Opinion.

rights law.⁶⁴ In detail, the Commission points out that any form of Member State participation in the CIA programme would violate the ECHR.⁶⁵ The Venice Commission finally suggests certain steps that member states should take to ensure that the ECHR rights are sufficiently protected in this context.

While the investigations in Europe unanimously describe both the rendition campaign and the secret detention campaign as illegal and a violation of human rights, high-ranking US state officials defend the use of renditions as a means of strategic importance⁶⁶ in the ‘war on terror’. According to them, renditions ‘take terrorists out of action, and save lives’⁶⁷. Interestingly, this quotation by US State Secretary Condoleezza Rice points out the difference between (formerly known types of) renditions and extraordinary renditions: the purpose of extraordinary rendition is to withdraw a suspect. While earlier renditions might be described as ‘renditions to justice’⁶⁸ – a term which implies the aim to transfer a suspect so that he/she can be put on trial –, extraordinary renditions are used for persons whom the US government perceives as a threat to national security. Such security concerns, however, might lead to indifference concerning the subsequent prosecution or detention of the person rendered.⁶⁹

Detention camps, black-site prisons and the discussion about torture

Arguably, the purpose of the extraordinary rendition campaign is to bring terrorist suspects to a location – such as an overseas military facility – in which they can be secretly interrogated about their activities. The rendition campaign is therefore closely interwoven with US military detention camps such as Guantánamo Bay and secret prisons.

Detention programme

Already during the Reagan administration in the 1990s, the CIA had about half a dozen terrorists in custody at any time and usually kept them in foreign prisons, mostly in Egypt and Jordan.⁷⁰ But just two months after the attacks of 11 September 2001, CIA paramilitary teams working with foreign intelligence

64 The European Convention on Human Rights (ECHR) is a treaty by the Council of Europe. It sets out fundamental rights for individuals of the participating member states.

65 Hakimi (2007): 443.

66 Cf. George Tenet’s Statement before the 9-11 Commission (National Commission on Terrorist Attacks Upon the United States (2004)).

67 U.S. Secretary of State (2005).

68 Cf. Center for Human Rights and Global Justice (2005); Satterthwaite (2007).

69 Fitzpatrick (2003): 458.

70 Satterthwaite (2007).

services had arrested dozens of people who supposedly had knowledge of the forthcoming attacks on the United States. Apparently, most of the victims of the secret detention programme since autumn 2001 were finally brought to Guantánamo Bay, the US military base on Cuba. The US military opened a prison called Camp X-Ray there in January 2002 and transported some of the prisoners captured in Afghanistan to it. The conditions of imprisonment at Camp X-Ray have frequently been described since then and the photographs of prisoners in wire cages (which do not allow for any privacy since they are see-through) were published all over the globe. Later, prisoners were moved into Camp Delta while Camp X-Ray was closed. Children up to 16 years were held in a separate detention facility called Camp Iguana. Those imprisoned at Guantánamo Bay are detained for the purpose of interrogation in order to secure information on the al Qaeda network and to prevent possible future terrorist attacks.

In June 2005, the UN special rapporteur on terrorism, Manfred Nowak, accused the US of secretly detaining terrorist suspects in various secret locations around the world, notably aboard prison ships in the Indian Ocean region.⁷¹ A Washington Post article of 2 November 2005 claimed that the CIA ran secret prisons in eight countries.⁷² In particular, Thailand and two Eastern European countries were mentioned as host countries.⁷³ Shortly after this article was published, Human Rights Watch suggested that the Mihail Kogalniceanu military base in Romania and a Polish intelligence service training facility close to Szymany Airport were the locations of the two 'black sites' in Eastern Europe which were mentioned in the Washington Post article.⁷⁴ The CIA was operating such black sites according to a classified presidential directive of 17 September 2001. The locations of most black-site prisons remain unclear, however. According to the British human rights organisation Reprieve, detainees are held in camps in countries such as Afghanistan, Pakistan, Iraq, Egypt, Morocco and South Africa. Also, ships have been used as floating prisons.⁷⁵

One secret prison that became officially public in February 2008 is the detainment facility on the Island of Diego Garcia, an overseas territory of the United Kingdom in the Indian Ocean. The territory is the international legal

71 BBC News (2005); cf. Reprieve (2007): p. 11ff.

72 Washington Post (2005b).

73 Washington Post (2005b).

74 Human Rights Watch (2005a). The allegations were later repeated in the Second Marty Report. Cf. Guardian (2007b).

75 See the map printed in The Guardian (2009b). Further allegations have been made that the US has used certain of its own military facilities abroad (for example, the Coleman Barracks close to Mannheim, Germany) but have been investigated without any real legal rigor (Süddeutsche Zeitung (2009)).

responsibility of the UK and there is a small group of UK military personnel on the island, but the island is also home to a large US military base.⁷⁶ As early as 2004, a retired US general, Barry McCaffrey, twice publicly mentioned that the Island of Diego Garcia is one of the camps used by US authorities to detain suspects.⁷⁷ The UK government always denied any use of Diego Garcia in the context of rendition flights, however. Only increasing public pressure and the serious allegations expressed, among others, in the Second Marty Report, led the UK Parliament to start an investigation in October 2007. As part of its inquiry into British overseas territories, the Foreign Affairs Committee pursued the allegations. While it did not provide any evidence of the use of Diego Garcia facilities as a ‘black-site’ prison, the UK government had to admit in early 2008 that the island had indeed been used for refuelling stops during two US rendition flights in 2002.⁷⁸ In reply to a request under the Freedom of Information Act by MP Andrew Tyrie, the Foreign and Commonwealth Office maintained that the US government denied any further use of UK territory, the Overseas Territories or the Crown Dependencies for rendition flights.⁷⁹

Treatment and condition of detainees

Only in May 2006 did the Pentagon release a list of detainees who had so far been held at Guantánamo Bay detention facilities.⁸⁰ All in all, there have been more than 700 prisoners at Guantánamo. On 31 January 2007, 275 prisoners were left, according to the US Department of Defense.⁸¹ Recent figures suggest that ‘about 255’ prisoners are still held there.⁸² The prisoners can be divided into three categories: ‘one, those who have already been cleared for release or transfer but cannot be returned home because they would likely face torture or other abuse; two, those the United States wants to try; and three, those who the United States says are too dangerous to release yet cannot be tried.’⁸³

76 Second Marty Report 2007, par. 70. Agreements (‘Exchange of Notes’) regulate the relationship between the UK and US with regard to Diego Garcia, cf. Reprieve (2007), Appendix 1. See also The Guardian (2007c).

77 MSNBC (2004); National Public Radio (2006).

78 House of Commons (2008); Times Online (2008b).

79 Foreign & Commonwealth Office, Counter Terrorism Department (2008).

80 For an overview with both released and current detainees see the list compiled by the Washington Post, online access: <http://projects.washingtonpost.com/Guantánamo/>. See also the information provided by the US Department of Defense, ‘Detainees at Guantánamo Bay’, online access: <http://www.defenselink.mil/news/nadgb.html>.

81 This number was also provided by a senior counterterrorism counsel at a hearing of the European Parliament on 28 February 2008. Cf. Human Rights Watch (2008a).

82 New York Times (2008f).

83 Human Rights Watch (2008a).

While some of the prisoners were arrested ‘on the battlefield’ in Afghanistan, others were arrested in countries such as Bosnia-Herzegovina and the Gambia and were certainly not soldiers. They are not treated as ‘ordinary’ criminals either, since they were imprisoned in a war-like context. The US government used the unusual circumstances to deny those prisoners the status of ‘prisoners of war’ (POWs) under the Third Geneva Convention which would mean that they would have to be treated according to international human rights law and given proper legal assistance.⁸⁴ Neither are they considered to be civilians under the Fourth Geneva Convention. Instead, they are seen as ‘enemy combatants’ and are held incommunicado, i.e. they are denied contact with a lawyer or are not given access to a court.⁸⁵ This procedure is in sharp contrast to international regulations such as the ECHR which emphasizes the importance of the lawfulness of a detention. Based on this, in a recent case heard by the European Court of Human Rights (ECtHR) it was maintained that reasons of national security are no excuse for national authorities to avoid court control of the lawfulness of any detention.⁸⁶

Fitzpatrick further suggests that this form of detention ‘may contravene human rights norms because of the debilitating psychological effects.’⁸⁷ This is even more likely given the fact that most of the prisoners were subjected to so-called ‘enhanced interrogation techniques’ such as waterboarding, sleep deprivation and sensory deprivation.⁸⁸ For this purpose, the CIA uses a building inside the military complex at Guantánamo Bay (the other parts of the facility are run by the US Department of Defense).⁸⁹ In his speech on 6 September 2006, the then President Bush justified the existence of such prisons by arguing that it could save the lives of US citizens.⁹⁰

In the same speech, Bush also acknowledged the existence of CIA secret prisons outside US territory and in addition to the detention facilities at Guantánamo Bay. He admitted that individuals who pose ‘a significant threat, or may have intelligence that we and our allies need to have to prevent new attacks’ were moved to ‘an environment where they can be held secretly, questioned by experts and - when appropriate - prosecuted for terrorist acts.’⁹¹ These particular individuals are categorized by the US government as so-called High Value Detainees (HVD) which is a particular category of

84 Fitzpatrick (2003): 463.

85 Venice Commission Opinion, par. 124.

86 Al-Nashif v. Bulgaria, Eur. Ct. H.R. App. No. 50963/99 92, 94 (2002), quoted in Fitzpatrick (2003): 481-482.

87 Fitzpatrick (2003): 480.

88 ABC News (2005).

89 Washington Post (2004a); cf. Amnesty International (2006a).

90 White House, Office of the Press Secretary (2006).

91 White House, Office of the Press Secretary (2006); The Guardian (2006).

prisoners distinguished by the US government. In such black-site prisons, detainees are subject to an ‘alternative set of procedures’.⁹²

As mentioned earlier, however, the end points of renditions are not only black-site prisons run by the CIA. Some people have also been rendered to states whose security authorities are well known for the use of robust interrogation techniques and torture such as Egypt, Pakistan and Morocco. In April 2008, Human Rights Watch published a report indicating more than a dozen cases of prisoners who had been sent to Jordan for torture.⁹³ An unpublished memorandum of 13 March 2002 entitled ‘The President’s Power as Commander in Chief to Transfer Captive Terrorists to the Control and Custody of Foreign Nations’ apparently constitutes the authoritative act for such a transfer.⁹⁴ In those prisons abroad, it seems to be common practice that the interrogation of terrorist suspects is conducted by local staff who are prepared with questions from the foreign intelligence service. This procedure allows the sending state to claim that it was not directly involved in any illegal treatment of prisoners. Indeed, the state which transferred the individual in question does not necessarily know about the interrogation techniques used by the local interrogators.⁹⁵ However, it has chosen the host country because of its reputation for using harsh interrogation techniques – a practice which is sometimes referred to as ‘outsourcing torture’⁹⁶.

‘Enhanced interrogation techniques’ and the use of torture

After denying that US officers interrogated terrorist suspects by means of torture, the US government finally admitted the use of coercive interrogation techniques in 2006.⁹⁷ In a public speech, the then President Bush maintained that a few key leaders from the two political parties knew about this ‘alternative procedure’.⁹⁸ When such coercive interrogation techniques were used by the CIA, he said, the interrogations were overseen by the CIA’s Inspector General and were reviewed by the US Department of Justice and CIA lawyers. The interrogators and other people involved in the procedure were carefully selected and experienced CIA officials who also received specialized training, according to Bush. He vehemently denied, however, that this could be interpreted as torture.⁹⁹ Instead, the US government referred to

92 White House, Office of the Press Secretary (2006).

93 Human Rights Watch (2008b).

94 Chesterman (2006): 563.

95 House of Lords/House of Commons, Joint Committee on Human Rights (2006).

96 The New Yorker (2005).

97 For example, Condoleezza Rice stated in 2005: ‘The United States does not permit, tolerate, or condone torture under any circumstances’, cf. U.S. Secretary of State (2005).

98 The White House, Office of the Press Secretary (2006).

99 The White House, Office of the Press Secretary (2006).

such instruments as ‘enhanced interrogation techniques.’ However, according to the Second Marty Report this term is ‘essentially an euphemism for some kind of torture’.¹⁰⁰ Only at the end of Bush’s presidency would a top administration official publicly state that the US military had tortured a Guantánamo detainee. Susan Crawford, the convening authority of military commissions who oversees trials, charges and the sentencing of Guantánamo Bay detainees, concluded that Mohammed al-Qahtani’s overall treatment was coercive and abusive and must be described as torture.¹⁰¹

The means used by the US government to fight terrorism include the use of coercive interrogation methods such as sleep deprivation, forced nudity, painful stress positions and the use of dogs.¹⁰² The most controversial technique in recent media debates, however, is waterboarding. This term refers to a practice that is often described as mock drowning: the detainee is usually bound to a plank slanted towards the floor while his face is covered with cellophane or a similar material. The interrogators then pour water over the detainee’s face until he feels he is suffocating or drowning.¹⁰³ Some observers found that waterboarding is not only mock drowning but that it is rather ‘... real drowning that simulates death. That is, the victim experiences the sensations of drowning: struggle, panic, breath-holding, swallowing, vomiting, taking water into the lungs and, eventually, the same feeling of not being able to breathe that one experiences after being punched in the gut. The main difference is that the drowning process is halted. According to those who have studied waterboarding’s effects, it can cause severe psychological trauma, such as panic attacks, for years.’¹⁰⁴ Arguably, waterboarding is a form of torture and is illegal under many domestic laws, including US law.¹⁰⁵ The technique is also prohibited by the International Convention Against Torture (ICAT) and the International Covenant on Civil and Political Rights (ICCPR) which both prohibit torture as well as inhuman or degrading treatment or punishment. The intention of the international conventions and treaties against the use of torture is that the prohibition is non-derogable, i.e. it is a right which cannot be the subject of suspension even during periods of national emergency. This is also the interpretation of the ECtHR which

100 Second Marty Report, Introductory Remarks, par. 2.

101 Washington Post (2009a).

102 For example, see the twenty-four techniques Donald Rumsfeld approved for terrorists imprisoned at Guantánamo Bay in 2003 (U.S. Secretary of Defense (2003)). See also U.S. Department of Justice, Office of Legal Counsel (2002); U.S. Congress, Senate Armed Services Committee (2008).

103 Human Rights Watch (2005b). See also Chesterman (2006): 561.

104 Washington Post (2007), emphasis in original.

105 Chesterman (2006): 560.

conceives the prohibition of torture as a peremptory norm in international law.¹⁰⁶

To circumvent legal problems, the US government redefined torture, or in other words it narrowed its own definition of torture, as maintained by a leaked memorandum of the US Department of Justice Office of the Legal Counsel in August 2002.¹⁰⁷ According to this Memorandum, torture is limited to physical pain ‘equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death’ or mental suffering that results in ‘significant psychological harm of significant duration, e.g., lasting for months or even years.’

In 2007, allegations were made that videotapes, which would show harsh interrogations of detainees in secret prisons, had been destroyed by the CIA. The allegations were later substantiated and the CIA admitted that the tapes were destroyed in November 2005 based on an order by the CIA’s head of clandestine services, Jose A. Rodriguez Jr.¹⁰⁸ Only in February 2008, did Michael Hayden, the Director of the CIA, state that the Agency used waterboarding against three ‘enemy combatants’, namely Khalid Sheikh Mohammed, Zayn al-Abidin Muhammed Hussein (better known as Abu Zubaida) and Abd al-Rahim al-Nashiri while they were in US custody at a secret detention site.¹⁰⁹ He ensured that the technique was only used in 2002 and 2003 and is no longer used. On the same day, US Attorney General Michael Mukasey announced that there would not be a criminal investigation into the CIA’s use of waterboarding on terrorist suspects given the legal basis of the actions.¹¹⁰ Instead, the US Justice Department announced an investigation by its internal ethics office into the department’s legal approval for the use of waterboarding on terrorist suspects by the CIA.¹¹¹ A report by the bipartisan Senate Armed Services Committee issued in December 2008 accuses the former Secretary of Defense Donald Rumsfeld and his deputies of direct responsibility for the harsh treatment of detainees at Guantánamo Bay and criticizes that their policies also allowed further abuses like the ones in Abu Ghraib.¹¹² While the government had been claiming that such abuses were the actions of a few ‘bad apples’ among military staff, the Committee

106 Guild (2007): 6, emphasis in original.

107 U.S. Department of Justice, Office of Legal Counsel (2002).

108 Guardian (2007a); New York Times (2007b).

109 Guardian (2008a). On 11 February 2008 the US administration announced that Khalid Sheikh Mohammad and 13 other terrorist suspects will be tried as high-profile detainees for terrorism-related war crimes in the context of the 9/11 attacks by a military commission.

110 Washington Post (2008a).

111 New York Times (2008b).

112 U.S. Congress, Senate Armed Services Committee (2008).

argued that there was a direct relation between the rationale of the government's policy and the abuses.¹¹³

Respectively in December 2007 and February 2008, the US Congress and Senate approved an intelligence authorization bill that would have banned the CIA from using aggressive interrogation techniques by limiting its potential methods to the ones outlined in a US Army field manual on interrogations.¹¹⁴ Former President Bush, however, used his presidential power to veto this bill claiming that such techniques are very valuable tools in the 'war on terror'.¹¹⁵ In the meantime, it was revealed that military interrogators had also been authorised to use harsh interrogation techniques by the Justice Department in 2003.¹¹⁶ The Defense Department restricted the use of interrogation methods through the 2005 Detainee Treatment Act, however, which only allows the use of methods set out in the Army Field Manual on Intelligence Interrogation, which bans coercive interrogations.¹¹⁷

President Obama apparently put an end to this legal limbo by outlawing waterboarding and other coercive interrogation techniques in one of his first executive orders. He renewed the US commitment to the Geneva Convention on the treatment of detainees and, consequently, the CIA will have to follow the US army field manual on interrogations. Also, announcements by key personnel of the Obama government signal a clear policy change in this matter. For example, both the new US Attorney General, Eric Holder, and the new CIA Director, Leon Panetta, stated that they conceive of waterboarding as torture.¹¹⁸

Within secret prisons, and in particular in the case of Guantánamo Bay, there is evidence and very strong indications that not only US authorities have interrogated detainees but that European security officials have interrogated detainees themselves or accompanied interrogations by the US authorities. Examples of this are the involvement of the BND in the case of Kurnaz (mentioned above) and the allegations of complicity in torture against British intelligence and security officials.¹¹⁹ Certainly not all European states have been involved and only a few might have sent their own staff, but others apparently asked foreign interrogators to ask questions on their behalf. The

113 Washington Post (2008c). See also Sands (2008); Washington Post (2009).

114 Washington Post (2008b).

115 Washington Post (2008b).

116 New York Times (2008c).

117 The 2005 Detainee Treatment Act is accessible online at: <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr359&dbname=109&>. See also Washington Post (2005c).

118 Washington Post (2009b).

119 The Guardian (2007d); The Sunday Times (2006).

latter practice raises issues of the state responsibility of European states which will be discussed in the following section. Also, given the increasing international exchange of information and intelligence, European governments ought to tackle serious questions such as a) whether to allow the use of information (e.g. in order to prevent a terrorist attack or as a basis for the surveillance of individuals) gathered through torture and b) how they can know under which circumstances any information has been gathered. The political discussion concerning these questions in the UK had been intense until the House of Lords published a strong position unconditionally in favour of prohibiting the use of torture, based on the common law tradition as well as European and international law obligations.¹²⁰

Former President Bush announced the closure of Guantánamo Bay on several occasions since 2006, and the US State Department emphasized a couple of times that the government is indeed working towards this aim.¹²¹ In January 2008, even Michael Mullen, the current US Chairman of the Joint Chiefs of Staff, pledged the shutdown of the Guantánamo Bay Camp.¹²² By mid-January 2008, however, there were 275 detainees left at Guantánamo, according to an announcement by the Pentagon.¹²³ Currently, the Guantánamo Bay Detention Facility is still operational. The US government even built a new high-security prison (Camp 6) in Guantánamo in 2006/2007. According to a New York Times article of 21 October 2008 the Bush administration decided not to close Guantánamo at any time soon due to ‘too many legal and political risks’ that the closure would involve.¹²⁴

In one of his first executive orders, however, President Barack Obama ordered the closure of not only the Guantánamo Bay prison, but all detention facilities which the CIA currently operates worldwide within a year.¹²⁵ Nonetheless, the process of closing the detention facilities at Guantánamo Bay seems less easy than expected and the actual closure might be delayed due to various challenges.¹²⁶

120 Geyer (2007): 4-5. See also European Parliament (2006a); House of Lords (2005).

121 Times Online (2006a); BBC News (2007a).

122 Süddeutsche Zeitung (2008b).

123 Süddeutsche Zeitung (2008b).

124 New York Times (2008e).

125 The White House, President Barack Obama (2009).

126 Times Online (2009a); New York Times (2008f).

One reason for that is that most of the trials against Guantánamo detainees have not yet started and, in fact, until the summer of 2008 there had not been a single trial of anyone imprisoned at Guantánamo Bay.¹²⁷ In June 2008, the first trial started against Khalid Sheikh Mohammed and four other detainees accused of plotting al-Qaida's 2001 attack and this is still ongoing. Although a 2008 directive by the US Supreme Court urged judges to set dates for the processes involving Guantánamo Bay detainees due to the long detention periods they have already experienced, legal and military experts do not expect quick trials, partly because they might involve the death penalty and claims of torture.¹²⁸ Moreover, it appears that the Justice Department has difficulties in providing sufficient evidence to hold detainees at Guantánamo Bay because the cases rely on intelligence material whose credibility is unclear.¹²⁹

The first conviction against a Guantánamo detainee was obtained in the trial against the personal driver of Osama bin Laden, Salim Ahmed Hamdan, which began on 21 July 2008. Within less than three weeks, he was found guilty of providing material support for terrorism through his association with Osama bin Laden and other members of al Qaeda and was sentenced to five and a half years' imprisonment.¹³⁰ In November 2008, 18 of the Guantánamo detainees were facing war crimes charges.¹³¹

With respect to the detainees at Guantánamo Bay who will probably not be charged at all, the key problem appears to be that detainees from countries such as Algeria, China, Libya, Somalia, Tajikistan and other states fear repatriation because of the torture they might have to face in their home

127 *Süddeutsche Zeitung* (2008b). The first attempts by the US government to try Guantánamo detainees were struck down by the Supreme Court in 2006. The trials were assumed to be illegal since they were not ordered by Congress, but by President Bush alone. There had been one conviction in March 2007, which was not based on a trial but rather on a guilty plea. The then Guantánamo prisoner David Hicks pleaded guilty to providing material support for terrorism and was sentenced by a Commission to seven years' imprisonment. He was given six years and three months' credit for the time already spent in detention and was transferred to Australia to serve the remainder of the nine months.

128 *New York Times* (2008d).

129 For example, see the decision after the first hearing on the US government's evidence for holding detainees at the Guantánamo Bay detention camp in November 2008 (*New York Times* 2008g).

130 He was found guilty of providing material support to terrorism. He was acquitted of the original charge of conspiracy and was given five years' credit for the time during which he had been detained since charges were first brought against him in July 2004. Cf. Human Rights Watch (2008c).

131 *New York Times* (2008f).

countries.¹³² Following the international ban on refoulement – which can be described as ‘the absolute prohibition on forced return to torture or cruel, inhuman, or degrading treatment or punishment’¹³³ – the US government is not allowed to return them under such circumstances. In this context, a federal court decided in October 2008 to remove the ‘enemy combatant’ designation of 17 Chinese Uighurs imprisoned at Guantánamo Bay since 2001. They had been already cleared for release in 2004, but the US government stated that they would remain in Guantánamo Bay because they might face persecution if returned to China. Judge Ricardo Urbina decided that they had to be freed immediately and given parole status in the US. The US government reacted angrily stating that the group might pose a security threat to the US and that this case might set a precedent for further Guantánamo detainees to seek US entry. It therefore filed an emergency motion and a federal appeals court granted its request and blocked the planned release so that the government would have more time to argue against the plan.¹³⁴

Arguably, some European governments have been involved in this aspect of the ‘war on terror’ insofar as they have been very reluctant to take their former residents back. However, there are now no European citizens left at Guantánamo Bay, also thanks to public pressure in European societies.¹³⁵ Countries such as the UK, Spain, Denmark, Belgium and Turkey have resettled former Guantánamo detainees.¹³⁶ The Special Representative of the Parliamentary Assembly of the Organization for Security and Co-operation in Europe (OSCEPA) had emphasized in her 2006 and 2007 reports the responsibility of OSCE and NATO states to facilitate the return of their nationals from Guantánamo Bay.¹³⁷ For European governments, the following question remains: what will happen to the roughly 60 detainees who are found completely innocent and have already been cleared for release but whose countries of origin do not respect the international ban on torture? The European Parliament passed a resolution in this context which calls for the resettlement of Guantánamo detainees from third states where the prisoners would have to fear torture in their own country.¹³⁸ On 11 December 2008, in an open letter to his EU counterparts, Portugal’s Foreign Minister offered to grant asylum to those detainees who cannot return to their countries of origin

132 For example, see Washington Post (2007b); Cageprisoners (2008).

133 Fitzpatrick (2003): 479.

134 CNN (2008).

135 Washington Post (2008d).

136 BBC News (2007b); BBC News (2007c); U.S. Department of Defense, ‘Detainees at Guantánamo Bay’, online access: <http://www.defenselink.mil/news/nadgb.html>.

137 OSCE Parliamentary Assembly (2006).

138 Center for Constitutional Rights (2007). See also Center for Constitutional Rights (N.N.).

subject to the condition that other EU countries would do the same.¹³⁹ Until that date, only the Albanian government had agreed to accept a few of these prisoners.¹⁴⁰ The initiative by the Portuguese government has led to intense domestic political discussions in some EU countries. In particular, the German government is split on the issue. While the Minister of the Interior rejects the idea of accepting former Guantánamo detainees since they could potentially prove to be a danger, the Foreign Minister indicated that the government is considering accepting detainees in individual cases. A few governments – such as Austria and the Netherlands – reject the notion of taking any former detainees since they see the resettlement of Guantánamo detainees as a responsibility for the US government only, while others such as Finland are pushing for an EU-wide solution and are currently looking into the legal and political challenges.¹⁴¹ Behind closed doors, the issue was discussed at the EU General Affairs and External Relations Council meeting on 26 January 2009, but the Member States did not reach an agreement.¹⁴²

Preliminary conclusion

Silkenat and Norman argue convincingly that the establishment of a spider network and the secret prison system has implied a certain level of bureaucratization and that the violation of human rights standards, contrary to US law, has become institutionalized.¹⁴³ This does not necessarily mean that, even within the CIA, all officials have been aware of what was going on. Tyler Drumheller, the former chief of the CIA's Europe division, maintained in the context of black-site prisons and renditions: 'If they're doing it in Europe, I would have known. But if they were taking people out of Europe, I wouldn't have known.'¹⁴⁴ The testimonies of rendered individuals make it very difficult to believe, however, that the programme could be kept secret for a long time. Rather, there seems to be a degree organisation behind both the extraordinary rendition campaign and the secret detention programme. While it might have been possible for the CIA to act completely undercover in Europe, cases such as those of Sweden and Italy suggest that the CIA co-operated with European state authorities or that the latter were at least informed about its activities.

139 The letter is available online:

http://www.portugal.gov.pt/Portal/EN/Governos/Governos_Constitucionais/GC17/Documentos/20081210_Eng_MENE_Int_DH_Guantanamo.htm .

140 Center for Constitutional Rights (2007); BBC News (2009).

141 Süddeutsche Zeitung (2008d).

142 Washington Post (2008d).

143 Silkenat/Norman (2007): 550-551.

144 Frontline (2006).

The rendition campaign should be understood as an exceptional instrument of counter-terrorist policing. This term refers to measures intended to prevent or to fight terrorism proactively. That includes, among others, police, intelligence and law enforcement agencies at the local, national and international level. The rendition campaign mirrors the increasing merger of external and internal realms of security. State borders no longer provide an absolute framework for the provision of security. The CIA is a US agency, some of the aircraft under suspicion were let by private companies, the detainees originated from a variety of countries, mostly asylum-seekers or refugees who were then brought either to detention camps run by the CIA or states where local security authorities interviewed them and they were imprisoned. Often, as seen in the cases of Italy and Sweden explored above, national authorities were involved (e.g. border police and immigration authorities or intelligence services).

3. Reactions, the involvement and ignorance of European states

Having sketched the existing jigsaw pieces of the CIA programme and the various links to European state authorities, it seems necessary to ask what actions the European governments have taken in reaction to the extraordinary rendition and secret detention campaign. This section will focus on how, if at all, some European nation states and the European Union reacted to the rendition campaign, the detention programme and the accusations of torture. There is no scope for a detailed comparative analysis here and therefore the objective of the argument will be to illustrate general patterns of reactions while now and then emphasizing individual cases.

While organisations such as Amnesty International recommended that all Council of Europe member states allegedly involved in cases of rendition should initiate an inquiry, this has hardly been the case so far.¹⁴⁵ In general, it can be observed that the reactions in Europe were very different in nature. While in some European states there seem to have been no or very little public discussion, in others both legal and political responses are on their way.

¹⁴⁵ Amnesty International (2006b).

We can distinguish at least four types of reactions by state authorities:

- investigation by national parliaments,
- investigation by governmental bodies,
- legal response by judicial authorities, and
- no official reaction beyond rhetoric.

The starting point for this research is the questionnaire¹⁴⁶ that was sent out by the TDIP Committee of the EP to European governments and which contained the question whether the countries had established a special committee concerning the allegations about the CIA secret detention programme. According to the replies, only the German Parliament had established such a committee.¹⁴⁷ This does not exclude the possibility that standing committees have been involved in investigations, of course, but the small number already sheds light on the poor reactions by governments and parliaments given the complicated issue. In the following I will highlight some replies by European state bodies to the allegations of tolerating or assisting CIA flights in their territory or airspace.

Investigations by national parliaments

A few European countries, such as Sweden, Romania and the UK, have initiated a parliamentary investigation concerning extraordinary rendition flights. In Germany, an investigation is still ongoing. The investigations differ both in terms of their mandate and rigour. Some other national parliaments, such as the Belgian, have dealt with issues related to potential extraordinary rendition cases, secret detention facilities or other features concerning the current intelligence co-operation with the US authorities through individual questions raised by Members of Parliament.

In the case of Sweden, a parliamentary investigation into a particular case of rendition was carried out (see the summary of the Swedish case above). The cases of Mohammed al-Zery and Ahmed Agiza were investigated by the Parliamentary Ombudsman and the Swedish Parliament consequently published a report focusing on the involvement of the Swedish government in these issues. According to media reports, there are allegations of more CIA flights in Sweden which have not yet been investigated.

¹⁴⁶ The questionnaire can be accessed online:
http://www.europarl.europa.eu/comparl/tempcom/tdip/default_en.htm .

¹⁴⁷ The mandate of that committee is actually very broad but one key aspect is indeed the investigation into allegations in this context.

The Romanian Parliament investigated the claim that a secret prison existed on Romanian territory. The head of the investigation committee, Norica Nicolai, emphasized the lack of any evidence that the CIA operated a prison in Romania or used facilities to interrogate people on Romanian territory.¹⁴⁸

In Germany, a parliamentary investigation is ongoing as was briefly described earlier. Given the complexity of its mandate, in July 2007 the investigative committee appointed an expert investigator. The investigator argued in his 2008 report to the investigation committee that an investigation could only be completely successful if the US authorities would cooperate and provide sufficient information.¹⁴⁹ Together with other current allegations against the BND, the political pressure is high to reform the standing parliamentary committee to control the German intelligence services (Parlamentarisches Kontrollgremium) and to extend its mandate.¹⁵⁰

Concerning the UK, the First Marty Report stated that although Parliament had not yet initiated an inquiry into the possible British participation in human rights abuses committed by the US in the 'war on terror', it had stimulated a public debate through various activities. In July 2008, the Foreign Affairs Select Committee, an all-party parliamentary body, urged the government to investigate the US claims that Great Britain had not been used for renditions.¹⁵¹ Emphasizing a 'legal and moral obligation', it also requested that the government should explore the US government's use of interrogation techniques such as waterboarding. In clear terms, the Committee argued that '(g)iven the clear differences in definition, the UK can no longer rely on US assurances that it does not use torture, and we recommend that the government does not rely on such assurances in the future.'¹⁵² Finally, it asked the government to investigate allegations that the UK had 'outsourced' the interrogation of six terror suspects to Pakistan's ISI intelligence agency, where they were interrogated and possibly tortured by British intelligence officers.¹⁵³

148 International Herald Tribune (2008b).

149 Süddeutsche Zeitung (2008a).

150 Die Zeit (2008); Süddeutsche Zeitung (2008c).

151 House of Commons, Foreign Affairs Committee (2008).

152 House of Commons, Foreign Affairs Committee (2008), par. 9.

153 BBC News (2008).

Investigations by governments

In Denmark, opposition parties asked for a parliamentary inquiry into allegations that Danish airspace and airports had been used by the CIA in the context of renditions which the government and its ally refused. A documentary called 'The CIA's Danish Connections' was broadcast in January 2008 and provided new evidence that Narsarsuaq Airport in Greenland had been used for CIA flights. The Danish government then promised publicly to discuss this issue with the US government but did not allow an investigation.¹⁵⁴

In France, the Attorney General of Bobigny commenced an investigation on 20 January 2006 into an aircraft bearing the serial number N50BH, which supposedly stopped on 20 July 2005 at Le Bourget Airport. The Attorney General will explore whether this aircraft, coming from Oslo, was used by the CIA for the transport of prisoners and whether French authorities were aware of this. The French newspaper *Le Figaro* pointed to a second suspicious aircraft which supposedly stopped at Brest Airport in March 2002,¹⁵⁵ but so far there has been no official investigation into this case. It is, however, being investigated by the Canadian authorities since it supposedly originated there.

Parallel to the parliamentary investigation, the Romanian government also conducted an investigation into the allegations of hosting a secret prison in its country. In a letter to the European Commission, a Romanian government spokeswoman stated that the committee of inquiry found that the allegations were 'unfounded'.¹⁵⁶ The current government seems to be reluctant to discuss the topic any further. The Defence Minister Ioan Mircea Pascu called it 'a closed subject', according to an article in the *International Herald Tribune* on 24 February 2008.¹⁵⁷

Legal responses

Concerning individual cases of extraordinary renditions and former detainees of US detention camps and secret prisons, legal trials are pending in several European countries such as Spain, Germany, Italy, Switzerland and Portugal.

A Spanish attorney investigated whether CIA flight stopovers violated human rights law. According to media reports, the Canary Islands and Palma de

¹⁵⁴ Channel News Asia (2008).

¹⁵⁵ *Le Figaro* (2007).

¹⁵⁶ BBC News (2007d).

¹⁵⁷ *International Herald Tribune*, (2008b).

Mallorca were used as a destination for rendition crews after conducting rendition operations, and as a location where logistical meetings could take place in relation to specific operations.¹⁵⁸ The government claims that it did not have any knowledge about this. In February 2008, the National Court also inquired why the Spanish government had updated a bilateral defence treaty with its US counterpart briefly after the 9/11 attacks which gives US aircraft more flexibility when landing at the US bases in Spain.¹⁵⁹ The Spanish newspaper *El País* published several articles and official documents in December 2008 which indicate that the US government formally requested assistance from the Spanish Foreign Ministry. One leaked letter of 10 January 2002 by a high-ranking official of the Spanish Ministry of Foreign Affairs, Miguel Aguirre de Cárcer, to the then Foreign Affairs Minister, Josep Piqué and the Secretary of State for Foreign Affairs, Miquel Nadal, explains that the US Embassy in Madrid asked the Spanish government to permit stopovers in Spanish airports for long-term flights in cases of emergency or under extraordinary circumstances.¹⁶⁰ The US explicitly maintained that the security of people being transported would be its own responsibility. The letter also suggests that the US had made similar arrangements with other countries. This request by the US was granted by the Spanish government within less than 24 hours.¹⁶¹ An information note by the Spanish Section of the Permanent Hispanic-North American Committee further suggests that the Spanish officials involved wanted to keep the (potential) landings as far away from the public as possible, since they suggested using airports in remote areas.¹⁶² The brief letter also considers the possibility that European persons might be on board those flights and the potential legal consequences that this would have.

In the Second Marty Report, the governmental authorities of Bosnia and Herzegovina are highlighted as the only ones which have acknowledged their responsibility for involvement in a case of extraordinary rendition. The case involved six Algerians, four of whom were citizens of Bosnia-Herzegovina and two with residence status in the country. They were arrested in Sarajevo by Bosnian police officers and handed over to US military forces at the Butmir

158 The Independent (2005); *El País* (2005a); *El País* (2005b).

159 Proyecto Desaparecidos (2008a).

160 Online access (2 pages): http://www.elpais.com/elpaismedia/ultimahora/media/200811/30/espana/20081130elpepunac_1_Pes_PDF.pdf ; http://www.elpais.com/elpaismedia/ultimahora/media/200811/30/espana/20081130elpepunac_2_Pes_PDF.pdf .

161 Cf. <http://www.statewatch.org/news/2008/dec/04spain-rendition.htm> .

162 Online access: http://www.elpais.com/elpaismedia/diario/media/200812/01/espana/20081201elpepinac_1_Pes_PDF.pdf .

base on 17 January 2002.¹⁶³ The six men were then flown to Guantánamo Bay where they remain detained without trial. The Bosnian Human Rights Chamber maintained the illegal nature of these detentions.¹⁶⁴ The authorities in Bosnia-Herzegovina were put under great pressure by the US Government, which threatened to sever diplomatic relations unless the six men were arrested on terrorism charges.¹⁶⁵

In Germany, a court in Munich issued international arrest warrants against 13 suspected CIA officials involved in a rendition case of Khaled el-Masri.¹⁶⁶ In Italy, a trial in Milan is pending against several CIA officials and staff members of the Italian intelligence service (see the summary of the Italian case). In Portugal, the Attorney General Cândida Almeida announced on 5 February 2007 that there would be an investigation into the stopovers by CIA flights which supposedly transferred people to secret prisons.¹⁶⁷ The investigation is based on allegations by MEP Ana Gomes concerning human rights violations and illegal activities. In March 2008, the UK human rights organization Reprieve published a list of more than 700 prisoners who had supposedly been transferred to a CIA prison through Portuguese airspace.¹⁶⁸ At least one of the 28 aircraft under investigation landed on Portuguese territory, according to Reprieve. In Switzerland, a criminal probe into the use of Swiss airspace to fly the kidnapped imam Abu Omar from Italy to Germany started in February 2007. But the case was suspended in November 2007, according to the spokeswoman of the Swiss Federal Prosecutor's Office.¹⁶⁹

Overall, judicial proceedings are often hampered by the excessive secrecy of counter-terrorism activities. One example of this is a recent ruling by the English High Court concerning the case of Binyam Mohamed, a former UK resident who was subject to an extraordinary rendition and is currently imprisoned in Guantánamo Bay. His lawyers had asked the Court to release to the public certain documents provided by the US government concerning his treatment during the detention period. The British Foreign Secretary David Milband had issued a public interest immunity certificate to prevent their disclosure. According to the judges, he had argued that the release of the documents would jeopardize the UK's national security because in that case

163 First Marty Report, par. 133ff. The TDIP Report, par. 22, suggests that those soldiers were part of the NATO-led Stabilisation Force (SFOR).

164 First Marty Report, par. 139.

165 Cf. TDIP Report.

166 Spiegel Online (2007); BBC News (2005e); New York Times (2005b).

167 Washington Post (2007c).

168 Reprieve (2008).

169 Proyecto Desaparecidos (2008b).

the US had threatened to stop sharing intelligence about terrorism with the UK. The judges decided not to overrule the certificate, but sharply criticized both Miliband and the US government for making such a threat. After the judgment became public, the Foreign Minister argued in an emergency statement to MPs that the US had not made a ‘threat’ as such, but that the government had only warned Britain that the release of the documents would be ‘likely to result in serious damage to US national security and could harm existing intelligence information-sharing between [the] two governments.’¹⁷⁰

No investigative reaction

This is surely the most typical reaction both by governmental and parliamentary bodies in the member states of the Council of Europe. After the reports by the CoE and the TDIP, non-governmental organizations and journalists continued to collect evidence of CIA flights in Europe which might have been used in the context of extraordinary renditions and for secret prisons in Eastern Europe. However, the state authorities remain very hesitant or clearly reluctant to open investigations into these allegations. As illustrated by some of the cases mentioned above, even in countries where the authorities have started an investigation, this is often hampered for various reasons.

US governmental authorities have stated on several occasions that the CIA programme has been conducted in a way that respects the sovereignty of the countries involved.¹⁷¹ To respect the sovereignty of a country in this context, however, implies that certain European governmental authorities must have known about the activities. This is even more worrying given the findings of the Venice Commission that some individuals were transferred completely outside any legal process.¹⁷²

The illustration of the three monkeys which do not see, do not hear and do not speak might visualize the three different types of groups involved: pretending to be blind seems to be the reaction by operational staff at the airports or military airfields, for example. It is very difficult to see how the US agencies could have acted in many cases of rendition without the consent of national officials, i.e. airport staff as well as members of the police, customs and intelligence services.¹⁷³ The three cases of Sweden, Italy and Germany which are described above illustrate some of the forms in which local authorities might have been involved in renditions. Other reports such as the

170 The Guardian (2009c).

171 U.S. Secretary of State Condoleezza Rice (2005).

172 Venice Commission Opinion, par. 52; Hakimi (2007): 446.

173 See also Fitzpatrick (2003): 459, fn 8.

ones by the Council of Europe, the European Parliament and several human rights organizations point out further possible interactions.

Pretending to be deaf seems to be the reaction by certain European governments. It is obvious that European governments tend only to admit what has been published so far anyway and otherwise ensure that they did not know about any CIA flights or its secret detention programme.

Finally, the silent monkey might refer to those Parliaments which remain surprisingly passive. This is remarkable given the general mandate of controlling the executive which all parliaments in Europe have. The CIA programme touches upon issues of human rights and individual freedoms. If there is any serious allegation or reason to be suspicious about governmental behaviour or possible involvement in this context, it is arguably the responsibility of a parliament to use its control and oversight powers in this context.

The European Union

After Dick Marty had started his investigation into the CIA detention programme for the CoE, the European Parliament (EP) quickly decided to follow up on this issue and the report was published in January 2007. Basically, this report is an updated version of the First Marty Report. Since the EP report was published, it remains unclear how exactly the EP is going to follow up on this issue. The report also made it very clear that co-operation with other EU bodies in order to collect information did not run very smoothly or, in other words, some EU bodies seem to be reluctant to assist the work of the EP for unknown reasons. At the beginning of 2008, the EP was still discussing internally whether and, if so, how to follow up the TDIP report.¹⁷⁴ The possibility that a follow-up will take place is quite small at the time of writing, however: in December 2008 the Conservative and Socialist groups in the EP rejected a request by the Liberals, the Greens and the Communist groups to debate the CIA extraordinary rendition programme and Guantánamo in a plenary session of the EP that month.¹⁷⁵ The Commission, namely the then EU Commissioner for Justice and Home Affairs, Franco Frattini, urged the governments of Poland and Romania in July 2007 to conduct an in-depth investigation into the EP Report's allegations against them concerning their complicity in rendition flights and

¹⁷⁴ Interview with an MEP on 3 March 2008.

¹⁷⁵ Ludford (2008).

the tolerating of detention facilities, but as of spring 2008 neither government had replied.¹⁷⁶

With respect to the Guantánamo Bay detainment facility, the EU has stated on several occasions that the conditions in the camp have to be improved and that it has to be closed as soon as possible. For example, Benita Ferrero-Waldner, the European Commissioner in charge of External Relations and Neighbourhood Policy, stated in 2006 that ‘every person who has been detained must enjoy a status under international law and not to be detained arbitrarily and to receive due process and fair trial. No one should be subject to ‘incomunicado’ detention and the international committee of the Red Cross must always be allowed access to detained persons wherever they may be.’¹⁷⁷ The European Parliament passed a resolution on Guantánamo in 2006 calling for the closure of the Guantánamo Bay detention facility, the treatment of detainees in accordance with international humanitarian law and the setting up of fair and public trials.¹⁷⁸

Preliminary Conclusion

Little has so far been done by European governments and parliaments to shed more light on CIA rendition activities. The involvement of states remains rather unclear, although the allegations are very serious. All governments should have, however, an interest in clarifying the allegations. If they (might) indirectly profit from the programme by gaining information that is gathered in one of the secret prisons or military camps, they have to be aware of the circumstances under which this information was gained. Of course, there is little reason to believe that executives involved in torture would publicly disclose any wrongdoings.¹⁷⁹ But what is needed, nevertheless, is a discussion on the democratic values and ethical benchmarks that were slowly established as common ground for Western intelligence services in the past decades. A very important cornerstone of this development was the creation of parliamentary accountability and oversight mechanisms to scrutinize the intelligence services. Consequently, in the final section I want to discuss the CIA programme as a high-profile example that raises the question of how increased networking between security bodies from various countries can be held accountable.

176 Guardian (2008).

177 European Parliament (2006c).

178 European Parliament (2006b).

179 Chesterman (2006): 572.

4. Lessons to be learned?

Obviously, the CIA campaign and the reactions in European states thereto indicate the serious challenges that arise from a transnational provision of security. While security was traditionally provided within the nation-state framework, this is increasingly a task which requires cross-border activities. What is so far lacking at the policy-making level are clear answers to how to ensure the maintenance of democratic values and human rights in this respect, e.g. through an adequate and effective system of control and oversight of intelligence services. To explore such problems in the context of international intelligence co-operation, and in the context of CIA flights in particular, Terry Davis, the CoE Secretary General sent out a questionnaire in 2005 to all CoE Member States to inquire how their national laws ensure that acts by foreign agencies within their jurisdiction are subject to adequate controls. Based on the results, the CoE requested that the Member State governments take certain specific measures to satisfy their obligation to secure a system of control and oversight and thus not to escape their responsibility for the conduct at issue. The Secretary General identified four areas in which state governments should (re)consider actions¹⁸⁰:

- the regulation and oversight of intelligence services, in particular foreign ones;
- international regulations with respect to air traffic (transiting aircraft);

180 Council of Europe, Secretary General (2006).

- international rules on state immunity (human rights exceptions to rules of immunity); and
- diplomatic assurances (should be replaced by formal agreements and guarantees).

In the following, I will focus on two aspects only: diplomatic assurances and the regulation and oversight of intelligence services.

Diplomatic assurances

The solution that several European governments found with respect to the CIA rendition programme was to require diplomatic assurances from the US government. Such assurances are understood as an instrument to ensure the well-being of a rendered and/or imprisoned person. Those agreements come in various forms such as verbal notes, written agreements or memoranda of understanding. These instruments are very controversial, however.¹⁸¹ The Steering Committee of Human Rights (CDDH) of the Council of Europe discussed the various types of assurances, their usefulness and effectiveness based on a questionnaire sent to state governments. In its second report in 2006, the Committee stated that no agreement on the issue could be found.¹⁸² While some states found diplomatic assurances to be effective (i.e. they would ensure the well-being of a rendered person), others did not use such instruments at all.

The key problem concerning diplomatic assurances is the lack of safeguards to guarantee their implementation. It remains unclear how binding such assurances between governmental bodies are. If, in the case of rendition and detention, they are breached by one party, very little can be done by the other party to ensure the person's safety. To control post-facto whether such assurances were followed is difficult mainly for reasons of sovereignty since it would mean allowing foreign governmental authorities to have access to state security institutions (e.g. prisons). Consequently, the CoE Secretary General stated that 'we cannot rely solely on assurances to ensure the effective implementation of the rights and freedoms guaranteed by the Convention [i.e. the ECHR, C.H.]. We need first and foremost enforceable guarantees and control mechanisms.'¹⁸³

181 For critical evaluations from a human rights perspective see, for example, Human Rights Watch (2005c); Amnesty International (2006c).

182 Council of Europe, CDDH (2006).

183 Council of Europe (2006), par. 2.

In the context of the CIA programme, diplomatic assurances were often used as a pretence to avoid careful investigations. A good example of this is the discussion on the secret prison on the UK overseas territory Diego Garcia. In June 2004, the then Foreign Secretary Jack Straw emphasized that ‘(t)he United States authorities have repeatedly assured us that no detainees have at any time passed in transit through Diego Garcia or its territorial waters or have disembarked there and that the allegations to that effect are totally without foundation. The Government are satisfied that their assurances are correct.’¹⁸⁴ Such firm assurances by the US government in this context were also pointed out in the 2007 Report of the UK Intelligence and Security Committee.¹⁸⁵ As mentioned earlier, however, in early 2008 the UK government had to admit that the island had indeed been used for refuelling stops during rendition flights.

Human rights organisations go one step further and argue that diplomatic assurances in this context might even weaken the prohibition of torture.¹⁸⁶ A diplomatic assurance might be misused by governments by denying any further responsibility. If the state counterpart abroad ensures that it will not use torture, it is easy for a state government to deny any further – legal and moral – responsibility for the rendered person.

The regulation and oversight of intelligence services

The second aspect is the regulation and oversight of intelligence services. The reason for exploring such aspects in the context of the ‘war on terror’ and the CIA programme is obvious given the use of extraordinary means. Such means require a ‘vigorous control, oversight and review of state security intelligence activities.’¹⁸⁷

Concerning the CIA programme, serious weaknesses can be pointed out concerning the parliamentary oversight of intelligence services. This was already mentioned by the Secretary General of the Council of Europe, but I want to explore the aspect of public accountability in more depth in this section. Accountability is a very contested concept but can be described as ‘being liable to be required to give an account or explanation of actions and

184 House of Commons (2004); Second Marty Report, par. 70.

185 Intelligence and Security Committee (2007), par. 197.

186 See also UN (2005). The UN High Commissioner Louise Arbour mentions both diplomatic assurances and the existence of secret prisons as facts that weaken the ban on torture.

187 Gill (2007): 213.

where appropriate, to suffer the consequences, take the blame or undertake to put matters right, if it should appear that errors have been made.’¹⁸⁸

Up to the 1970s, intelligence services were only controlled and overseen by executive (i.e. internal and ministerial) accountability instruments, if at all. At that point, Western societies began to see such a control and oversight system as insufficient for democratic societies given the extraordinary powers and the secretive work of the intelligence services.¹⁸⁹ Parliamentary oversight was understood as an additional safeguard to ensure a responsible attitude by intelligence services as well as their democratic accountability. Some state governments strongly resisted any oversight arrangements but scandals in the field of intelligence and sometimes debates among the general public created such political pressure that governments finally agreed to certain arrangements of oversight and democratic accountability.¹⁹⁰ While ‘(t)he ultimate authority and legitimacy of intelligence agencies rest upon legislative approval of their powers, operations and expenditure’¹⁹¹, five elements for the democratic control of intelligence services have been identified by academic scholars:

- internal intelligence control by the individual services themselves,
- strong executive control,
- parliamentary oversight,
- judicial review, and
- external review by independent civil society organizations.¹⁹²

There is a fundamental dilemma in the arrangement of any system for overseeing intelligence services, in particular a parliamentary one: how can activities be regulated, controlled and overseen which have to take place in secrecy in order to be successful?¹⁹³ Both the academic literature on this topic and the practical experience in recent decades suggest, however, that it is possible to have legislative control in this field although countries have found very different ways of establishing a system of intelligence oversight.¹⁹⁴ Thus, there is no single normative model for the democratic control of intelligence services. The systems of parliamentary oversight vary with respect to their

188 Oliver (1991): 22.

189 However, ‘effective parliamentary oversight depends on effective control of the agencies by ministers. Parliaments can only reliably call politicians to account for the actions of the intelligence agencies if ministers have real powers of control and adequate information about the actions taken in their name’ (Leigh (2007): 71).

190 Gill (2007): 195.

191 Leigh (2007): 71.

192 Cf. Born/Wetzling (2007); Born/Johnson/Leigh (2005).

193 Chesterman (2007): 553.

194 Born/Johnson/Leigh (2005); Smidt et.al. (2007); Schreier (2007): 38.

mandate, structure, membership and access to classified information, or investigative powers in general.¹⁹⁵ To ensure a ‘good’ or satisfactory parliamentary oversight of intelligence services in democratic societies, Hans Born and Thorsten Wetzling identified three aspects, namely the maintenance of parliamentary ownership over intelligence oversight procedures, the establishment of ‘embedded’ human rights in intelligence affairs and the safeguarding of the political neutrality of intelligence services.¹⁹⁶

The establishment of legitimate and effective democratic control of intelligence remains a difficult task.¹⁹⁷ The work of parliamentary committees is usually so secretive that not only citizens but also parliamentarians in the plenum only get bits and pieces of information, if at all. Both the public and parliamentarians have to trust the committee members that they do a good job. At the same time, only the provision of information allows a reasonable public discussion. This is also an issue of state ‘branding’ and of establishing a positive image of intelligence services. Consequently, certain Western services recently decided to become more proactive and started to communicate with the public in various forms. The websites of various services have been smartened up and filled with more detailed information than ever before, services such as the Dutch AIVD provide a small-scale demonstration of spying techniques and there are several museums such as Moscow’s KGB museum and the privately operated International Spy Museum in Washington. Also, some services such as MI5 have allowed journalists, for example, to report on the work of some of their staff members and, for the first time in the history of MI5, the serving head of the Service, Jonathan Evans, gave journalists an interview in January 2009.¹⁹⁸ This cautious process of opening the doors must certainly be understood as a driving force for staff recruitment for the services, but it should not be interpreted as only a way to attract new potential employees. It is also a way of communicating with citizens in general. The question remains, however, what can be done to ensure democratic oversight given the increasing linkages between intelligence services. In the words of Born and Wetzling: ‘How can the danger be averted that national intelligence policy-makers utilize cooperative arrangements to circumvent national human rights standards, for instance, those that govern the legality of practices applied to obtain information on suspected terrorists?’¹⁹⁹

195 Leigh (2007); Born/Johnson/Leigh (2005).

196 Born/Wetzling (2007): 316.

197 For example, see Born/Caparini (2007).

198 Times Online (2009b).

199 Born/Wetzling (2007): 321.

European governments are aware that the increasing co-operation between intelligence services raises such new and difficult questions. For example, in the report on the UN Convention against Torture, the UK's Joint Committee on Human Rights emphasized the need to establish a proper framework for intelligence sharing by identifying minimum standards and establishing an adequate system of monitoring and scrutinizing compliance with those standards.²⁰⁰ This discussion is related to the question of what information provided by foreign services should be accepted and how it can be ensured that this information was gathered under 'legitimate' circumstances. Concerning the discussion in the UK, a distinction is sometimes made between information which the UK's own authorities gather and information which is provided by foreign authorities. While the former is officially condemned if gathered under torture, there seems to be a more 'relaxed' view in the latter case. From a legal point of view, the use of information gathered by torture in court is clearly illegal, but at the operational level the attitude might be rather pragmatic. While this issue was under discussion in the House of Lords in the UK, for example, Lord Nicholls of Birkenhead stated that governments might use information obtained by torture by referring to cases in which 'the government cannot be expected to close its eyes to this information at the price of endangering the lives of its own citizens. Moral repugnance to torture does not require this.'²⁰¹

The discussion on the CIA rendition programme leads to a broader challenge inherent in the work of intelligence agencies, namely that it has some international aspects. Arguably, the appropriate political level to oversee increasing cross-border information-sharing would be the international one. Such an oversight system would have to face several hurdles ranging from the co-ordination of the collaboration with intelligence services and oversight bodies abroad to the likely increase in the budget given the need for additional arrangements such as legal experts or translators. However, the hurdle for any overall international oversight system in the near future would be that it seems likely that 'no state would agree to be bound by the limits on intelligence gathering it would demand of its peers'.²⁰² Indeed, this problem would be even more intensified concerning the oversight of activities of foreign intelligence services in a state's territory.²⁰³ Not much research has been carried out in this field so far, but one option to circumvent state concerns in this respect seems to be to implement measures to allow a certain amount of oversight at the transnational level. One might think of the establishment of a supranational

200 House of Lords/House of Commons (2006).

201 House of Lords (2005), par. 67-69.

202 Chesterman (2007): 553.

203 To improve the mechanisms of foreign intelligence services is one recommendation published by Terry Davis.

oversight body. Apart from the immense problems of the mandate, structure and functions of such a body, this could only be a solution in the long run. Also, effective control and oversight needs an extraordinary knowledge of the mandate and functioning of the intelligence services.²⁰⁴ To ensure this at a supranational level would be extraordinarily challenging.

One option which could be implemented much more easily would be the establishment of ad hoc accountability forums. In this case, state governments would agree to create a framework which allows the creation of flexible bodies of accountability, the composition and equipment of which would depend on the individual case. This might be established within the framework of existing regional security co-operation arrangements such as the North Atlantic Treaty Organization (NATO) or, to start with, the EU. Since the EU obliges police and intelligence co-operation among its member states, in particular since the 9/11 attacks, it should consider a responsibility with respect to a democratic control and judicial oversight system for such co-operation. Finally, a measure which could be implemented most easily would be a more intense exchange with other oversight bodies abroad. For example, the UK's Intelligence and Security Committee (ISC) bilaterally exchanges views and ideas with other state oversight bodies. One indicator of an emerging multilateral exchange among oversight bodies of intelligence services is the International Intelligence Review Agencies' Conference which takes place in a different city biennially. Not much information is available on this Conference, but this is perhaps a small step towards what Peter Gill has called the 'oversight community'.²⁰⁵ Such an exchange might be restricted to the exchange of structural and organizational issues (composition, expertise, and so on) but it could also be thought of as an opportunity to exchange good practices. There are certain international intelligence bodies such as the Club of Berne which might provide a proper framework for the multilateral exchange of such ideas (unfortunately, the public is not informed about the activities of the body at all). Bilateral instruments might be useful as well, in particular if very sensitive topics would be at stake. Mechanisms to establish ethical standards and to ensure the observance of those regulations become even more relevant in the transnational sphere since, for example, legal instruments are less developed than within the nation-state framework.

The ongoing integration process within the EU and the establishment of an 'Area of Freedom, Security and Justice' (AFSJ), thus the area of European internal security, might illustrate that the establishment of a multilateral forum for the (ad hoc) oversight of certain international activities of intelligence services might be possible. It shows that a certain degree of co-

204 Schreier (2007): 44.

205 Gill (2007): 213.

operation is possible in the area of law enforcement and other security issues. Also, information-sharing and closer cooperation among security agencies within the EU is one of the core issues of the EU counter-terrorism strategy.²⁰⁶ Bodies such as the European Police Office (Europol) and the Joint Situation Centre (SitCen) need information delivered by member states' authorities so as to fulfil their mandates effectively. Situations are imaginable in which information gathered through torture is later processed at the EU level which might then lead to further EU decisions and operational activities back at the nation-state level. A responsibility to accompany the operational collaboration by a European oversight system can therefore be argued. Finally, the European jurisdiction already has a certain impact on European intelligence services. In the case of the UK, Mark Phythian argues that it was also thanks to the impact of European law on the British polity that led to an emerging intelligence legislation and parliamentary oversight system.²⁰⁷

That European judicial institutions can play an important role can also be illustrated by a very early example, namely the role of the European Commission on Human Rights²⁰⁸ in the 'long war' in Ireland. During this period, British security forces used coercive investigation techniques such as 'standing against a wall', sleep deprivation and food denial. Because of that, the British government was accused of torture. In October 1972 the Irish government brought a case against the UK to the Commission, and the final report by the Commission was provided in January 1976. Therein, the Commission considered the interrogation methods to be inhumane treatment.²⁰⁹ This decision did not exactly stop the British government from continuing to use extreme means (then mainly covert means), but it clearly damaged the UK government's international reputation in a political and moral context. Similarly, observers argue that the emphasis of the US government on the effectiveness of harsh interrogation techniques 'did not reduce the damage to the moral standing of the United States caused by revelations of abuse at Abu Ghraib, Guantánamo Bay, and secret CIA detention facilities.'²¹⁰

206 Council of the European Union (2005).

207 Phythian (2007): 303.

208 Before individuals were granted direct access to the European Court of Human Rights in 1998, the Commission was the body they had to apply to. The Commission then decided whether it would commence the case in the Court on the person's behalf.

209 Kennedy-Pipe/Mumford (2007): 123.

210 Chesterman (2006): 558.

Ethical implications

The discussion on waterboarding in particular should give rise to questions whether and, if so, which ethical guidelines exist for the activities of intelligence services. As the above discussion has illustrated, there are various ways in which European intelligence officers became involved in rendition flights and the interrogation of terror suspects, sometimes only in an indirect way by providing questions that the local interrogator should raise. However, the question remains what should be done with information that has been, or might have been, obtained through torture.

Apart from the fact that torture is banned by several international treaties and agreements²¹¹ of which at least all Western democratic societies are parties, there are also operational, empirical arguments against any 'revival' of such instruments. From the perspective of law enforcement, the problem is that the information cannot be used as evidence in criminal prosecution and therefore torture might be counterproductive for prosecution.²¹² From a historical perspective, the British experience with terrorism in Northern Ireland is illuminating. Apparently, interrogated suspects often had no detailed information and were not helpful. Means such as infiltration and eavesdropping would have been more effective in such circumstances.²¹³ Also, in the case of the French government's fight against Algerian rebels, Anne Appelbaum could not find archival evidence that and, if so, how torture helped the French side.²¹⁴ Finally, it can be argued that it is very difficult for the interrogator to identify true and false claims made by the tortured individual.²¹⁵ Information gathered by torture is not always reliable.

At first glance, ethics and intelligence seem to be an oxymoron per se since at least field agents use means which would never be given to ordinary citizens. In such a field, however, professional ethics become even more important. Also, many staff members of an intelligence service work as analysts and collectors and in that function they sometimes deal with very sensitive information by collecting, analysing and processing it. Their end-result – intelligence – informs political decision-making. In times of new technologies the methods for the collection of information are changing rapidly. Through some of these new developments intelligence gathering is facilitated in the

211 The most important of which is the 'United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' which entered into force in June 1987.

212 Silkenat/Norman (2007): 537.

213 Mayer (2005): 117.

214 Washington Post (2005d).

215 Silkenat/Norman (2007): 549.

sense that it can be conducted ‘from a distance’ (e.g. satellite images, telephone and internet interception, observation through CCTV cameras). This development raises new challenges for the ethics of the intelligence services. Furthermore, given the increasing international co-operation between intelligence services, it is essential for one country to be able to trust that the information provided by a second country is both accurate and has not been gathered through extreme means, namely through torture. Realists might argue that trust is not even necessary as long as the necessary information is shared. But information is, of course, easier and more beneficially shared in an arena in which at least a minimum of trust exists. Also, a service has to trust that the information provided by its counterpart is reliable.

Because diplomatic assurances are not sufficient in all cases, ethical guidelines are arguably an important element to bring more reliability into the world of intelligence services. Activities of intelligence services enter ‘many grey areas of moral thought’²¹⁶ as the CIA extraordinary rendition campaign illustrates. Not much is so far known about codes of ethics or codes of conduct in this field. While internal guidelines seem to exist at least in some Western countries, they are confidential and not open to the public. Studies on ethical principles within the intelligence services, such as the one provided by Ken Pekel (1998) on the CIA, are extremely rare. Moreover, Andregg is very critical about the use of written ethical guidelines since they might not easily fit the reality of intelligence services’ day-to-day business and their mandate to work towards/for the security of the nation.²¹⁷ Similarly, Pekel’s study illustrates that there is more to ethics than only guidelines; perhaps we can call it the ‘culture’ of an agency. Arguably, it needs a form of accountability to ensure that certain ethical standards are applied.²¹⁸ This is one more reason why it is necessary to establish certain elements of cross-border and international structures of accountability.

In simple terms, one can distinguish between a deontological and a consequentialist understanding of ethics. The deontologist focuses on absolute normative criteria, while the consequentialist focuses on the aim or the consequences. In terms of torture, the former would argue that it is forbidden to torture because it is morally wrong and therefore not acceptable under any circumstances. The latter would argue that there might be ends that justify the use of torture. This is often illustrated by referring to a ‘ticking bomb’ scenario. In this hypothetical scenario, one assumes that police or intelligence officers are interrogating someone who has placed a bomb

216 Andregg (2007): 53.

217 Andregg (2007): 53.

218 Chandler (2003).

somewhere and which will kill thousands of people unless the security bodies manage to get more information about its precise location. Although this scenario is very implausible, it is referred to in countless variations.²¹⁹ The main question concerning the consequentialist view remains, however: how can one know for certain what the consequences would be? The main criticism against deontologists is that sticking to absolute norms might be to put thousands of lives at risk.²²⁰ Such decisions are not easy to take but in a liberal democratic society this needs to be discussed extensively. There is a distinctive difference between legality and morality in this field and, as the CIA case shows, governments might hide behind the assurance that their actions were legal (such as the provisions of legal memoranda by the US government to narrow the definition of torture) but they might be nevertheless unethical or immoral in the eyes of the broader public. In the case of extraordinary renditions, this refers not only to the US, but also to an international public. This is exactly why democratic accountability and oversight of intelligence services deserve an important role in democratic societies, and why thorough investigations by European governments into the allegations in the context of CIA flights and prisons are so critical. As the then President of the Israeli Supreme Court argued in a decision against the use of torture against detainees: 'A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome difficulties.'²²¹

219 Chesterman (2006): 568. For example, Reemtsma (2005): 22-23. There are extreme situations of ethical dilemmas in this context, of course. In September 2002, there was a case in Germany concerning the chief superintendent of the Frankfurt police, Wolfgang Daschner. He asked one of his subordinates to interrogate a suspect, Magnus Gäfgen, who had supposedly kidnapped a child who might still have been alive. To get the information where to find the child, the police officer in charge threatened Gäfgen with the use of violent means to cause pain. This indeed prompted the suspect to reveal the location of the child. He had earlier already murdered the child, however. The court found both Wolfgang Daschner and his subordinate guilty of 'Verleitung zur Nötigung in einem besonders schweren Fall'. The judge accepted, however, the difficult situation and the 'honourable motives' of the police officers. Some observers criticized that the court did not define the threats by the police officers towards the suspect as torture (Reemtsma (2005): 1-2). Gäfgen appealed to the European Court of Human Rights which rejected the complaint and cleared Germany of the charge of tolerating torture (ECHR Application no. 22978/05). However, the case has now been referred to the Great Chamber.

220 See also Andregg (2007): 54.

221 Quoted in Chesterman (2006) referring to the case Pub. Comm. Against Torture v. Israel (1999), HCJ 5100/94, IsrSC 53(4) 1 at 37. Online access: http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf.

5. Conclusion

Current counter-terrorism activities include types of information-gathering and sharing which are exercised across borders and potentially have a global reach. The CIA's extraordinary rendition campaign arguably constitutes a particular case of international intelligence liaison. While some observers have pointed out that the campaign has been a (temporary) measure in extraordinary times, this paper has suggested that illuminating lessons can be learnt from this case and the pattern of global security provision that emerges from it. In particular, it has been analysed in how far the many ways of interaction between intelligence actors across borders can give rise to serious concerns about the way in which such liaison can be held to account.

While scandals in the field of intelligence services were necessary to push the idea of a certain degree of oversight and accountability of the services in the 1970s and 1980s, the CIA rendition flights ought to be an event which pushes oversight and control regulations further, including the oversight of foreign intelligence activities. In particular, the activities should be understood as a wake-up call for a more efficient and powerful system of parliamentary oversight of international intelligence activities. Although these types of activities are inherently international issues, the business of intelligence remains a domain of sovereign nation states and the crucial systems of parliamentary accountability and judicial control will also remain located at the domestic level. This paper suggests, however, that transnational ad hoc investigations by bodies such as the Council of Europe and the European

Parliament appear to be promising new elements in the global accountability landscape. Indeed, the Council of Europe's focus on human rights issues has led to the most rigorous investigation in this context so far. However, both transnational investigative bodies do not provide a permanent, formal format for such investigations and both lack powers to enforce their recommendations.

Moreover, any kind of accountability system – both at the domestic and the transnational level – in the context of counter-terrorism intelligence co-operation is severely hampered by the culture of excessive secrecy which traditionally surrounds intelligence liaison, but also the policy field of counter-terrorism in general. It has been illustrated in this paper at various points that such an approach potentially blocks or, at least, weakens any investigations into such activities, for example with respect to the challenges which the Milan prosecutors face in the trial concerning Abu Omar's rendition. To justify such a high level of secrecy, governmental authorities often claim that more transparency would jeopardize national security. Arguably, such claims sometimes appear to be of a fairly flimsy nature, as has been pointed out in the 2009 English High Court ruling on the release of documents concerning Binyam Mohamed's treatment in prison.

Intelligence services are governmental institutions and that is why they 'ought to act on behalf of the people, too'.²²² Information-gathering and sharing across borders can certainly be a valuable means in the fight against terrorism. Needless to say, tracing suspected terrorists and anticipating terrorist attacks in a bilateral or multilateral environment is extraordinarily difficult and requires very sensitive and secretive approaches. However, this must not occur at the cost of those individuals under suspicion, their social environment or any other people, whether they are detainees or victims of rendition. More intense bilateral and multilateral sharing of information requires that governments ensure, even more so, both compliance with the rule of law²²³ and that the services' activities respect human rights. Instruments to ensure such compliance can be implemented and enforced at the national level. Fighting terrorism has always been a question of norms, values and, hence, moral standing. This is an experience shared by many European countries from the 1970s onwards. To maintain democratic values and human rights ought to be the overall aim of any fight against political violence.

222 Born/Wetzling (2007): 317.

223 This refers to the requirement that 'the exercise of state power, in particular coercive power, must have support in statute law, subordinate legislation, or case law.' (Cameron (2005): 38).

While President Barack Obama has started to demolish the legacy of his predecessor concerning Guantánamo Bay, torture and rendition by four executive orders, problems remain, however, as to how to wind up the remaining issues. There is good reason to call for a multilateral solution for the closure of Guantánamo Bay, as US Vice President Joseph Biden did during the 45th Security Conference in Munich in January 2009. As this paper has shown, several EU countries are currently hesitant to share the burden. To take in a few former Guantánamo detainees would not mean taking away the responsibility of the US government, however. It would rather allow for a swifter release of the inmates based on humanitarian grounds. It is an important symbolic gesture to declare that an ‘institution like Guantánamo can and should not exist in the longer term’, as the German Chancellor stated in 2006, but it needs a more hands-on approach to effectively co-operate with the Obama administration in the process of closing down this detention facility.

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For ongoing online coverage of the discussion about extraordinary renditions and Guantánamo Bay see, for example, the following websites:

<http://www.statewatch.org/rendition>
<http://www.guardian.co.uk/world/ciarendition>
<http://www.guardian.co.uk/world/guantanamo-bay>

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